PUBLIC ESTHETICS AS A BASIS FOR LEGISLATION. — An inherent function of sovereignty, as *parens patriæ*, is to protect social interests. The police power to regulate the exercise of individual property rights, or, if necessary, to destroy the property itself, springs from the necessity of this function.[1] But to be entitled to such legislative protection the interest must be one that is actually recognized and one the promotion of which will benefit, at least indirectly, the public as a whole. Although these interests were originally thought of as confined to health, safety and morals, the courts are unquestionably tending toward a broader test.[2] A recent case, on the other hand, holds that public esthetics is not such an interest, and that a statute is unconstitutional which prohibits the building of retail stores in residential sections without the consent of a majority of the abutters.[3] *People* v. *Chicago*, 103 N. E. 609 (Ill.). This view is consistent with the authorities.[4]

It has been urged that unsightliness may be legislated against as much as smoke or noise.[5] But the two groups are distinct. The comfort, or even health, of substantially everyone in the neighborhood is disturbed by smoke and noise,[6] and so its prevention is of direct public benefit. Probably the display of revolting diseases in patent-medicine advertisements could be prohibited on this ground.[7] But only a limited group of esthetes can be thought of as suffering serious discomfort or inconvenience from the spectacle of unsightly buildings.[8] True, the public may be uplifted by the presence of architectural beauties, but it is not offended by their absence. There is, therefore, no direct harm to the public as a whole.[9] Nor is the social interest in the protection of the

[1] A recent text-writer explains the police power as the law of overruling necessity. PRENTICE, POLICE POWER, ch. 1. It has also been suggested that the police power rests on the sovereign's responsibility to the public welfare to enforce the maxim, *sic utere tuo ut alienum non lædas*. See FREUND, POLICE POWER, § 8; TIEDEMAN, LIMITATIONS OF POLICE POWER, § 1.

[2] Police power has been declared to include legislation deemed by "strong and preponderant opinion to be greatly and immediately necessary for the public welfare." See Noble State Bank *v.* Haskell, 219 U. S. 104, 111; 26 HARV. L. REV. 631, 632 and footnotes; 17 HARV. L. REV. 275. "It will reveal the police power not as a fixed quantity, but as the expression of social, economic, and political conditions. As long as these conditions vary, the police power must continue to be elastic." FREUND, POLICE POWER, § 3.

[3] The further interests of comfort of the residents and of safety of the children would have been promoted by preventing the traffic incident to the establishment of retail stores in the section. But the benefit would seem too slight for such considerations to carry weight.

[4] Haller Sign Works *v.* Physical Culture Training School, 249 Ill. 436, 94 N. E. 980; Passaic *v.* Paterson Bill etc. Co., 72 N. J. L. 285, 62 Atl. 267.

[5] FREUND, POLICE POWER, §§ 180 ff.; LARREMORE, PUBLIC ESTHETICS, 20 HARV. L. REV. 35.

[6] State *v.* White, 64 N. H. 48.

[7] See 17 HARV. L. REV. 275.

[8] See Curran Bill Posting and Distributing Co. *v.* Denver, 47 Colo. 221, 227, 107, Pac. 261, 264. "The cut of the dress, the color of the garment worn, the style of the hat, the architecture of the building or its color, may be distasteful to the refined senses of some, yet government can neither control nor regulate in such affairs."

[9] In this group of cases the legislature is substantially enlarging the category of public nuisances by declaring something to be a nuisance of which the harmful effect was insufficient to make it such at common law. See Lawton *v.* Steele, 119 N. Y. 226, 23 N. E. 878; Denver *v.* Mullen, 7 Colo. 345, 353, 3 Pac. 693, 697. For collection of cases see 36 L. R. A. 593 note. The basis is damage to the public as a whole. See Quintini *v.* Bay St. Louis, 64 Miss. 483, 490, 1 So. 625, 628.

individual or the fastidious few from esthetic discomfort, strong enough to justify the restriction of personal liberty. Legislation to protect the weak, poor and unfortunate from economic duress presents extreme examples of the justifiable use of the police power in favor of a particular class.[10] On the score of the social interest involved, there is a clear distinction between such legislation and a statute shielding the esthetic members of the community from sense discomfort. The police power, it may be said, exists to protect, not to uplift.[11] Thus, esthetic considerations, it would seem, fall outside the scope of the police power until the sensibilities of the community as a whole become so highly developed that the public is shocked and disturbed by what is ugly.[12]

In the exercise of the right of eminent domain the sovereign is thought of, not as a protector, but as a purchaser of private property for public use.[13] Esthetic considerations are therefore more pertinent. As to the meaning of public use, the authorities are in great confusion.[14] But whatever distinctions may be taken as to the degree of utility necessary, it would seem that the benefit must accrue to the community as a whole, not merely to a particular class.[15] The foregoing discussion of the police power presupposed a state of society where the average individual would not be seriously shocked by the sight of an ugly building. Conversely, it may be assumed, to the average pedestrian the spectacle of symmetrical architecture will pass unnoticed. To exercise the right of eminent domain by imposing such building restrictions is comparable to appropriating an easement of light where a majority of the community is blind.[16] Under the test requiring actual use by the public, only a

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[10] See 27 HARV. L. REV. 372; SWAYZE, JUDICIAL CONSTRUCTION OF THE FOURTEENTH AMENDMENT, 26 HARV. L. REV. 1. Holden *v.* Hardy, 169 U. S. 366 (eight-hour law for miners and smelters); Petit *v.* Minnesota, 177 U. S. 164 (Sunday law referring especially to barbers).

[11] This statement should be qualified to the extent that protection may demand an exercise of the police power along educational lines, such as compulsory education of children. But the theory of these cases is that the parent has no right to leave the child uneducated. See FREUND, POLICE POWER, §§ 264 ff.

[12] In Cochran *v.* Preston, 108 Md. 220, 229, 70 Atl. 113, 114, it was said of the police power, "it may be that in the development of a higher civilization, the culture and refinement of the people has reached the point where the educational value of the Fine Arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances, to the exercise of this power even for such purposes."

[13] See 1 LEWIS, EMINENT DOMAIN, 3 ed., §§ 1, 3. For an interesting argument that there is no distinction between taking property and regulating its use, see ABBOTT, POLICE POWER AND THE RIGHT TO COMPENSATION, 3 HARV. L. REV. 189. The fundamental distinction between the police power and the right of eminent domain would seem to lie in the end at which the legislation aims.

[14] See 1 LEWIS, EMINENT DOMAIN, 3 ed., § 252. See also collection of cases in 22 L. R. A. (n. s.) 35 note.

[15] Thus the attempted acquisition of fishing rights for the public was held unconstitutional. Albright *v.* Sussex Co. Lake & Park Commission, 71 N. J. L. 303, 57 Atl. 398. The court said, "The main object of the present statute is to furnish a means of amusement or sport to the few persons who have the inclination and leisure for such pastime. . . . We have found no instance of the exercise of the power in order to afford a means of pastime capable of being enjoyed by only a few persons."

[16] See Farist Steel Co. *v.* Bridgeport, 60 Conn. 278, 28 Atl. 561; Albright *v.* Sussex Co. Lake & Park Commission, *supra.*

limited class would use the view; under that of public benefit, the advantage would be negligible.

Esthetic considerations, on the other hand, may be incidental to some other public user. A Massachusetts statute, limiting the height of buildings around a public park, was passed to secure beauty as well as an easement of light and air.[17] Land has been condemned for roads leading nowhere but to beautiful views.[18] But the public as a whole actually used the easement of light and air or the public drive, whether they were conscious of the esthetic advantages or not.[19]

A further distinction should be noticed as to motive. Gettysburg Park was built for the avowed purpose of fostering a spirit of national patriotism.[20] But here again an actual public user of the land taken was assured. The education of the public esthetic sensibilities, however desirable, is no justification until the further element of public user is present.

CONSTITUTIONALITY OF EUGENIC MARRIAGE LAWS.— The increasing interest in eugenics justifies a prediction that within a few years several states, following Wisconsin, will prohibit the issuing of a marriage license to any male applicant who does not produce a physician's certificate stating that he is free from venereal diseases.[1] Will such statutes be a violation of the Fourteenth Amendment?[2]

To be justified as an exercise of the police power, legislation which restrains liberty or deprives of property must secure a recognized social interest. Further, the means employed must be such as will reasonably bring about the desired result. Finally, the resulting disadvantages must not, either because the means employed are unreasonable and burdensome, or for any other reason, overbalance the social benefit gained. Clearly a eugenic marriage law subserves a vital social interest by protecting the health of the wife and of future generations.[3] It has been demonstrated that proper medical tests will determine with considerable certainty the existence of sexual diseases in those examined. Adequate medical supervision, coupled with denial of marriage to the sexually unfit, will therefore effectively protect the woman who marries in the state and the children of that marriage. It may be argued

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[17] Att'y-Gen. *v.* Williams, 174 Mass. 476, 55 N. E. 77.

[18] Higginson *v.* Nahant, 11 Allen (Mass.) 530; petition of Mt. Washington Road Co., 35 N. H. 134.

[19] A more difficult case would arise where the sole object was to beautify the view from a public park. Since the public use the park for health and recreation, perhaps the fact that, consciously or unconsciously, they would derive a greater benefit from its use where the outlook was fine might distinguish the case from one where the restrictions are imposed upon any other part of the city. See *dictum* in Att'y-Gen. *v.* Williams, *supra*; Parker *v.* Commonwealth, 178 Mass. 199, 55 N. E. 634.

[20] United States *v.* Gettysburg Electric Ry. Co., 160 U. S. 668.

[1] See a sign of the times in the message of the Governor of Indiana to the legislature in 1905, quoted in 10 J. COMP. LEG. 120, 121. Parliament will doubtless be much more conservative than will many American state legislatures. *Cf.* remarks of Lord Roseberry, in 1908, quoted in the same article.

[2] Or similar provisions in state constitutions.

[3] See FREUND, POLICE POWER, § 124; TIEDEMAN, POLICE POWER, § 149.